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TENAGA NASIONAL BHD v. AHMAD ALIAS

HIGH COURT MALAYA, SHAH ALAM
ZALITA ZAIDAN JC
[CIVIL APPEAL NO: BA-12ANCVC-120-08-2017]
10 DECEMBER 2018

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CIVIL PROCEDURE: *Service – Writ of summons – Whether regular – Burden of proof – Whether plaintiff discharged burden on balance of probabilities – Whether service effected at address provided by defendant – Whether service regular – Rules of Court 2012, O. 10 r. 1*

C

UTILITIES: *Electric – Loss of revenue – Claim for – Whether registered consumer liable regardless of whether premises rented to third party – Whether registered consumer's obligation to notify change of premise address – Undertaking by third party to pay on behalf of registered consumer – Whether binding – Whether failure to pay amounted to breach of undertaking – Whether person giving undertaking liable to pay*

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The plaintiff supplied electricity to the registered consumer, Ong Geok Khuan ('Ong'), at the registered consumer's premise ('the premise'). The plaintiff, upon inspection, found that the meter at the premise had been tampered with resulting in the meter not recording the actual usage of the electricity, causing it loss of revenue. Consequently, the plaintiff issued a notice to Ong pursuant to s. 38(4) of the Electricity Supply Act 1990 ('the Act') demanding for the loss of revenue and expenses totalling RM309,667.07. Upon the request made to the plaintiff, the plaintiff agreed to meet with Ong for discussion. However, it was the defendant who came for the meeting and following a discussion between the defendant and the plaintiff's representatives, the defendant gave an undertaking to make the payment demanded by the plaintiff from Ong and the amount was reduced to RM102,471.25 to be paid by way of 12 months instalments. The plaintiff contended that upon the defendant's failure to honour the payment, the plaintiff filed an action against the defendant for breach of the undertaking. The defendant did not object to the suit and the plaintiff thus recorded a default judgment ('JD') against the defendant on 28 June 2016. However, the JD was successfully set aside by the defendant on 10 August 2017. Hence, the appeal by the plaintiff. The plaintiff raised an objection to the defendant's affidavit-in-reply dated 9 August 2017 claiming that it was never served by the defendant on the plaintiff and therefore, the plaintiff did not have the benefit of perusing or replying to the said affidavit during the hearing of the application for setting aside the JD. It was the plaintiff's contention that pursuant to O. 32 r. 13 of the Rules of Court 2012 ('ROC'), the defendant's failure to serve the affidavit-in-reply to the plaintiff was fatal and thus it should not be included in the record of appeal. The defendant's submissions, *inter alia*, were that (i) the service of the writ of summons was not regular;

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(ii) the actual consumer was the company, Sem Ann, which was renting the factory at the premise and the defendant was only an employee of Sem Ann; and (iii) the undertaking by the defendant was for and on behalf of Sem Ann.

Held (allowing appeal with costs):

(1) Any affidavit filed in court for use in a court proceeding or in chambers must be served on the other party pursuant to O. 32 r. 13 of the ROC. The plaintiff herein did not have the benefit of replying to the new information on the status of the company Sem Ann, the existence of which was only mentioned in the defendant's affidavit in support without the company search from the Companies Commission of Malaysia. The new information not properly accorded was fatal to the plaintiff and hence, the defendant's affidavit-in-reply should not be part of the record of appeal. (para 21)

(2) The burden was on the plaintiff to prove, on the balance of probabilities, that the service of the writ of summons on the defendant was regular in accordance with O. 10 r. 1 of the ROC. Based on the documents, the writ of summons had been properly served on the defendant at the address given by the defendant and at the address of the premise. The defendant had never objected to the correctness of the address. Therefore, the defendant's denial of receiving the writ of summons as declared in the defendant's affidavit-in-reply was a bare denial. The service was held to be regular. (para 22)

(3) Based on s. 38 of the Act and the plaintiff's record, the registered consumer owed the plaintiff the outstanding charges regardless of whether the premise was rented to a third party. It was the registered consumer's obligation to inform the plaintiff in the event of change of premise address. On the facts, the defendant came for the discussion with the plaintiff, the outcome of which was reduced into writing where an undertaking was agreed and drawn up for the defendant to pay the agreed payment. Nowhere in the letter of undertaking was it stated that the defendant was representing Ong or Sem Ann. (paras 24 & 25)

(4) An undertaking is binding where it is expressly stated to be by consent between the parties, whether the other is an individual or a company. Based on s. 2 of the Interpretation Acts 1948 and 1967, a 'person' is defined as 'includes a body of persons, corporate or unincorporated'. The name of the registered consumer mentioned in the letter of undertaking was Ong Geok Khuan. However, the defendant signed off the letter of undertaking with the words 'Ditandatangai oleh & bagi pihak Syarikat'. By doing so, the defendant had consented to and undertook to make the payment to the plaintiff. The substance of the undertaking was the payment undertaken by the defendant to be made to the plaintiff. The defendant had thus committed a breach of undertaking and was bound to make the payment. There was no defence on merits. (paras 27-31)

Case(s) referred to:

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysia Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

Hasil Bumi Perumahan Sdn Bhd & Ors v. United Malayan Banking Bhd [1994] 1 CLJ 328 SC ***(refd)***

Lau Pick Huong v. Soh Huang Siah [2014] 8 CLJ 488 HC ***(refd)***

Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd [2017] 5 CLJ 418 FC ***(refd)***

Michael C Solle v. United Malayan Banking Corp Bhd [1984] 1 CLJ 151; [1984] 1 CLJ (Rep) 267 FC ***(refd)***

Mohamed Mustafa v. Kandasami [1979] 1 LNS 53 FC ***(foll)***

Nasir Kenzin & Tan v. Elegant Group Sdn Bhd [2009] 1 CLJ 47 CA ***(refd)***

Ooi Poh Chin v. Tenaga Nasional Bhd [2016] 1 LNS 1024 HC ***(dist)***

Ridzuan Ahmad Idrus & Anor v. Mohd Yusof Omar [2017] 1 LNS 759 HC ***(refd)***

Tenaga Nasional Bhd v. Ichi-Ban Plastic (M) Sdn Bhd & Other Appeals [2018] 3 CLJ 557 FC ***(refd)***

Thomas Thomas v. Tenaga Nasional Bhd [2017] 4 CLJ 340 CA ***(refd)***

Yap Ke Huat & Ors v. Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor [2008] 4 CLJ 175 CA ***(refd)***

Legislation referred to:

Electricity Supply Act 1990, s. 38(3), (4)

Evidence Act 1950, ss. 91, 92, 101

Interpretation Acts 1948 and 1967, s. 3

Licensee Supply Regulations 1990, reg. 3(2)

Rules of Court 2012, O. 1 r. 1, O. 12 r. 1, O. 13 r. 8, O. 32 r. 13, O. 42 r. 13, O. 55 r. 4(7)

For the appellant - Anita Ibrahim; M/s Badruzzaman & Kamal

For the respondent - Siti Farliza Che Kob; M/s CM Lai & Partners

[Editor's note: Appeal from Sessions Court; Civil No: BA-A52NCVC-281-06-2016]

Reported by S Barathi

JUDGMENT

Zalita Zaidan JC:

Introduction

[1] The Sessions Judge on 10 August 2017 allowed the application of the defendant to set aside the default judgment (JD) obtained by Tenaga Nasional Berhad (plaintiff). Dissatisfied, the plaintiff appealed before this court.

Brief Facts

[2] The salient facts leading to this appeal can be summarised as follows:

(i) The plaintiff is a licensee under the Electricity Supply Act 1990. The plaintiff supplied electricity to the registered consumer, by the name Ong Geok Khuan (Ong), at the registered consumer's premise known as Lot 1296, Jalan Bukit Kemuning Bt 7, Seksyen 32, 40460 Shah Alam (the premise) through the account no. 0140 00314433.

(ii) The plaintiff stated in its statement of claim that the defendant is an individual and having its last known address by the plaintiff at Lot 3247, Bt 15, Kg Paya Jaras Dalam, 47000 Sungai Buloh, Selangor and/or Lot 1296, Jalan Bukit Kemuning, Bt 7, Seksyen 32, 40460 Shah Alam, Selangor, to which is denied by the defendant in its proposed defence (pp. 9, 26 and 53 of record of appeal).

(iii) On 19 July 2010, the plaintiff through its employees have inspected the premise and found evidence which the plaintiff's employees were of the opinion that the meter has been tampered with which resulted to the meter not recording the actual usage of the electricity at the premise, and hence TNB has suffered loss of revenue.

(iv) The plaintiff claimed that the plaintiff had as a result of the tampering of the meter, suffered loss of revenue and incurred expenses which the plaintiff is entitled to claim against Ong, being the consumer registered with the plaintiff under s. 38(3) of the Electricity Supply Act 1990.

(v) The plaintiff claimed that it has informed Ong of the finding during the inspection (p. 85 of record of appeal) and that Ong was also informed of the items taken away by the plaintiff, that is the evidence of the tampering of the meter (p. 86 of record of appeal).

(vi) The plaintiff issued a notice to Ong dated 2 September 2010 pursuant to s. 38(4) of the Electricity Supply Act 1990 demanding Ong to pay the plaintiff for the loss of revenue and expenses totaling RM309,667.07 (p. 88 of record of appeal).

(vii) The plaintiff claimed that on request made to the plaintiff, the plaintiff agreed to meet Ong for discussion (p. 90 of record of appeal). The plaintiff claims that all correspondences were addressed to Ong and the plaintiff did not receive any notice of change of consumer to any individual or corporation as required to be done by Ong following reg. 3(2) of the Licensee Supply Regulations 1990.

(viii) The plaintiff claimed that on 3 May 2011, the defendant came to the plaintiff's office in Klang, which is an undisputed fact. The plaintiff claims that based on the discussion between the defendant and the plaintiff's representatives, the defendant gave his undertaking to make the payment as demanded by the plaintiff to Ong and the amount was reduced from RM309,667.07 to RM102, 471.25 by way of 12 months instalments agreed by the defendant (pp. 74-76 of record of appeal).

(ix) The plaintiff claims that the defendant failed to honour the payment and the plaintiff filed a legal action against the defendant on the basis of the breach of the undertaking. The plaintiff claims that the defendant did not object to the suit and the plaintiff recorded a default judgment against the defendant on 28 June 2016 (p. 36 of record of appeal).

(x) The defendant on the other hand denied all the claims made by the plaintiff. The setting aside application filed by the defendant was allowed by the Sessions Judge on 10 August 2017.

(xi) The plaintiff had objected to the defendant's affidavit reply dated 9 August 2017, claiming that it was never served by the defendant's solicitors to the plaintiff's solicitor. The plaintiff claims that although the defendant provided the filing receipt for the filing of the defendant's affidavit in court but failed to provide proof of service of the defendant's affidavit to the plaintiff's solicitors. Prior to hearing defendant's application to set aside the JD, the plaintiff did not have the benefit of perusing or even replying to the defendant's affidavit and therefore did not have the benefit of perusing the said affidavit during the hearing of the setting aside application before the Sessions Judge.

(xii) The objection was raised before the Senior Assistant Registrar (SAR) on 9 October 2017 and was directed to be included in the record of appeal pursuant to O. 55 r. 4(7) of Rules of Court 2012 (ROC 2012) where the plaintiff was given a copy of the affidavit by the defendant's solicitor on 26 October 2017 after being directed by the SAR. The plaintiff argued that following O. 32 r. 13 of ROC 2012, the defendant's solicitor's failure to serve the affidavit to the plaintiff's solicitor is fatal and the affidavit should not be part of the record of appeal.

Decision Of Sessions Court

[3] The grounds of judgment can be found at pp. 1-5 of supplementary record of appeal where the Sessions Judge allowed the setting aside of the JD. The Sessions Judge decided that the service of the writ of summons on the defendant was regular and the defence was with merits on the ground that the letter of undertaking was signed by and on behalf of the company which was not in the defendant's personal capacity.

Plaintiff's Submission

[4] Learned counsel for the plaintiff submitted that the plaintiff is appealing partially on the Sessions Judge's decision which allowed the application for setting aside JD of 28 June 2016 (pp. 1-2 record of appeal). Briefly, the plaintiff's counsel submitted the arguments that the defendant does not have a defence of merits. It is submitted that the defendant is bound by his undertaking and that the letter of undertaking of 3 May 2011 (pp. 34 - 35 of record of appeal) is the avenue for the plaintiff to enforce in law against the defendant.

[5] The plaintiff's counsel averred that the invitation to attend discussion was issued by the plaintiff to Ong and not to the defendant but the defendant attended the discussion and proceeded to sign the letter of undertaking. It is submitted that nowhere in the letter of undertaking mentioned about the existence of Sem Ann.

[6] The counsel argued that prior to the setting aside application by the defendant, the plaintiff did not know the connection between Sem Ann and the premise, if any, to which the defendant has not proved. It is also submitted that there is no evidence that the defendant was an employee of Sem Ann and represented Sem Ann in the discussion.

[7] The counsel for the plaintiff highlighted that the defendant's defence of merit would rely wholly on the interpretation of the contents of the letter of undertaking. The plaintiff's counsel pointed out to this court that there is no evidence that defendant signed the letter of undertaking on behalf of Sem Ann. It is argued that the wording of "ditandatangani oleh & bagi pihak syarikat" in the standard letter by the plaintiff cannot be construed as to have effect that the defendant has signed the letter of undertaking on behalf of Sem Ann as it was not mentioned and equally, it cannot be construed as an undertaking on behalf of Ong as Ong is an individual and not a company.

[8] It is submitted that the defendant signed the letter of undertaking where Ong is stated as the consumer and the defendant had agreed to pay the amount claimed by the plaintiff and therefore the undertaking must be construed as given by the defendant in his personal capacity.

[9] The counsel submitted on s. 91 and s. 92 of the Evidence Act 1950 that the terms of the contract must be proved by the document itself which means, to construe the undertaking, it must be looked at within the four corners of the letter of undertaking. The counsel relied on the Federal Court case of *Michael C Solle v. United Malayan Banking Corp Bhd* [1984] 1 CLJ 151; [1984] 1 CLJ (Rep) 267 on the principles of construction to be applied to an undertaking and the case of *Nasir Kenzin & Tan v. Elegant Group Sdn Bhd* [2009] 1 CLJ 47 where the Court of Appeal had referred to the definition of "undertaking" which includes "a promise", that is a declaration which binds the person who makes the promise.

[10] Counsel for the plaintiff averred that the plaintiff's cause of action against Ong accrued since 19 July 2010 and the demand letter issued by plaintiff to Ong was dated 2 September 2010 (p. 88 of record of appeal), for loss of revenue and expenses incurred by the plaintiff. It is averred that if not for the defendant attending the discussion with the plaintiff, and proceeding to sign the letter of undertaking, the plaintiff would have commenced a legal action against Ong. It is submitted that the defendant is estopped from denying liability, based on the authority, *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysia Merchant Bank Berhad* [1995] 4 CLJ 283, Federal Court.

Defendant's Submission

[11] Learned counsel for the defendant submitted that the service of the writ of summons by the plaintiff was not regular as the writ of summons was addressed to the factory address of Sem Ann, as the premise was burnt down around the year end 2011 where the factory was no longer in operation. The defendant's counsel submitted that following the fire erupted at the factory, the defendant no longer works at the said factory.

[12] Counsel for the defendant submitted that for the second service to Lot 3247, Bt 15, Kg Paya Jaras Dalam, 47000 Sungai Buloh, Selangor, is the address of defendant's hometown which he hardly goes back, only once in every three to six months hence the defendant did not received the summons. The counsel relied on O. 42 r. 13 of the Rules of Court 2012 (ROC 2012) and O. 13 r. 8 of ROC 2012 for setting aside the JD and argued that the failure to file for appearance under O. 12 r. 1 of ROC 2012 was only a non-compliance of rules which is not fatal.

[13] In relying on the principle decided in the case of *Lau Pick Huong v. Soh Huang Siah* [2014] 8 CLJ 488; [2015] 7 MLJ 325, the defendant's counsel invited this court to consider whether the writ of summons served was regular or irregular and if it was found to be irregular, it could be set aside *ex debitio justitiae*. The counsel argued that the first and second service was not regular and the summons should be set aside *ex debitio justitiae*.

[14] The counsel submitted that the defendant's defence is with merits as the actual consumer is the company Sem Ann which is renting the factory at the premise, conducting the business of plastic and wood pallets and the defendant is only an employee holding the position as a marketing officer (pp. 7-12 of supplementary record of appeal II) of Sem Ann, and was not the director nor the shareholder of Sem Ann. The defendant's counsel submitted that the factory company Sem Ann was on fire end of the year 2012 and the said factory had stopped its operation since where the defendant's employment with Sem Ann ended.

[15] It was highlighted by the counsel that the registered consumer is Ong Geok Khuan (Ong) who should be responsible to pay outstanding charges to the plaintiff, having the contractual relationship with the plaintiff based on the decided cases of *Ooi Poh Chin v. Tenaga Nasional Berhad* [2016] 1 LNS 1024; [2016] MLJU 814 and *Thomas Thomas v. Tenaga Nasional Bhd* [2017] 4 CLJ 340.

[16] The counsel further averred that the defendant admitted attending the discussion in relation to the settlement of the outstanding charges but it was for and on behalf of Sem Ann which is consistent with the words as stated in the letter of undertaking referred, "ditandatangani oleh & bagi pihak syarikat".

Plaintiff's Reply

[17] The plaintiff's counsel submitted its reply that the service of the writ of summons on the defendant was done at the two address which is the first address given by the defendant as reflected in the letter of undertaking signed by the defendant. It is submitted that the second address is the address of the premise where the electricity was supplied to, the address of the registered consumer Ong. The plaintiff's counsel averred that the plaintiff never received any notice of change of address from the defendant. The plaintiff submitted that the service on the defendant is regular and the service to the

second address was an extra step taken by the plaintiff and therefore the service at the first address is regular which that alone suffice without the need to consider the service at the second address.

Appeal

[18] There have been many authorities on setting aside application to which the Court of Appeal case of *Yap Ke Huat & Ors v. Pembangunan Warisan Murni Sdn Bhd & Anor* [2008] 4 CLJ 175; [2008] 5 MLJ 112 is often quoted as the authority. I had also made the reference in a case before me on a setting aside application involving the issue of whether the service was regular or irregular in the case of *Ridzuan Ahmad Idrus & Anor v. Mohd Yusof Omar* [2017] 1 LNS 759 (Rayuan Sivil No: BA-12A-25-04-2016). At p. 120 of the *Yap Ke Huat* case (*supra*), the Court of Appeal referred to the Federal Court case of *Hasil Bumi Perumahan Sdn Bhd & Ors v. United Malayan Banking Corp Bhd* [1994] 1 CLJ 328; [1994] 1 MLJ 312, held that:

> [15] It is trite law that when considering to set aside a judgment in default, the first task is to ascertain whether it is regular or irregular judgment. If it is an irregular judgment, then the default judgment ought to be set aside *ex debitio justitiae*. If it is regularly obtained, then the principle expounded in *Evans v. Bartlem* [1937] AC 473 applies - see judgment of the Federal Court in *Hasil Bumi Perumahan Sdn Bhd & Ors v. United Malayan Banking Corp Bhd* [1994] 1 MLJ 312. This requires the defendant to show that he has a defence of merits. ..."

[19] This court bears in mind of the plaintiff's partial appeal which focused on the ground that the defendant has no defence of merits where the Sessions Judge had decided that the service was regular (pp. 1-2 of record of appeal). However, the defendant's counsel on the other hand submitted that the service was irregular, by denying that there was such service of the plaintiff's writ of summons (defendant's affidavit in reply to plaintiff's reply affidavit (pp. 3-5 supplementary record of appeal II, dated 9 August 2017).

[20] It was also raised that the plaintiff had objected to the defendant's affidavit in reply by submitting that it was not served to the plaintiff's solicitors referring to the correspondences produced (pp. 1-4 Tab 1 of plaintiff's bundle of authorities) and that the copy of the defendant's reply affidavit was only given to the plaintiff on 26 October 2017 after being directed by the Senior Assistant Registrar (SAR). Based on the court's minutes, the plaintiff objected to the inclusion of the defendant's reply affidavit and had noted that the defendant's reply affidavit was never received by the plaintiff, the SAR directed that the proof of filing of the defendant's reply affidavit be submitted to the court on 6 November 2017. However, nowhere in the court's minutes or in the court's file that a copy had been served to the plaintiff's solicitor. The correspondences handed to this court by the plaintiff are the letters of the defendant's solicitors dated 15 September 2017 and 26 October 2017 (tab 1, pp. 3-4 of plaintiff's bundle of authorities).

[21] This court viewed that any affidavit filed in court to be used in the court proceedings or in chambers must be served on the other party following O. 32 r. 13 of ROC 2012. This court finds that the plaintiff did not have the benefit of replying to the new information on the status of the company Sem Ann which was only mentioned of its existence in the defendant's affidavit in support without the company search from Suruhanjaya Syarikat Malaysia (SSM). This court viewed that the new information not properly accorded is fatal to the plaintiff and ruled that the defendant's affidavit in reply should not be part of the record of appeal.

[22] In relation to the service, the burden is on the plaintiff, on the balance of probabilities, to prove that the service was regular as in accordance with O. 10 r. 1 of ROC 2012, following s. 101 of Evidence Act 1950 and the principle as enunciated in the Federal Court case of *Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd* [2017] 5 CLJ 418; [2017] 4 MLJ 697. Upon careful perusal of the defendant's affidavit (pp. 40-44 of record of appeal), the plaintiff's reply affidavit (pp. 63-72 of record of appeal) and the affidavit of service of 28 June 2016, with the service endorsement of 8 June 2016, the accompanied letter of 8 June 2016 to the two addresses of the defendant, the proof of service (pp. 14-21 of record of appeal), a copy of the identification card of the defendant (p. 77 of record of appeal), the National Registration Department search (p. 79 of record of appeal) as well as the letter of undertaking (p. 34 of record of appeal), this court finds that the writ of summons was properly served on the defendant, based on the defendant's given address and on the address of the premise. The defendant never objected that such address is incorrect, the defendant's denial of not receiving the writ of summons as declared in the defendant's affidavit in support, was a bare denial. This court is of the view that the service was regular and the next issue to be considered is whether the defendant's defence is with merits.

[23] In the case of *Thomas Thomas* (*supra*), the Court of Appeal decided that it is the appellant's sole responsibility to pay all outstanding charges due to TNB despite the fact that the premise was rented to a third party. In this case, the plaintiff had notified Ong that the electricity meter was inspected and found to be tampered (pp. 85, 86 and 88 of record of appeal) where the plaintiff had notified Ong and the defendant agreed to attend the discussion for a reduction in the payment. Following s. 38 of the Electricity Supply Act 1990 (Act 1990), the plaintiff is to recover its loss of revenue without having to wait for the registered consumer prosecuted and convicted. The recent Federal Court case of *Tenaga Nasional Bhd v. Ichi-Ban Plastic (M) Sdn Bhd* [2018] 3 CLJ 557 (Rayuan Sivil No. 02(f)-20-03-2015(P) together with five others, No. 02(f)-63-10-2015 (W), No. 02(f)-64-10-2015 (W), No. 02(f)-71-10-2015(W), No. 02(f)-83-11-2015(B) and No. 02(f)-86-11-2015(P)) that was decided on 30 January 2018 held that among others, s. 38(3) of Act 1990 has created an entirely new statutory cause of action for TNB for recovery of loss of revenue in cases of meter tampering (see particularly para. 90 of the written judgment).

[24] Therefore based on s. 38 of Act 1990 and the plaintiff's record on the registered consumer (p. 81 of record of appeal), the registered consumer owes the plaintiff the outstanding charges regardless the premise is rented by a third party. It is the registered consumer's obligation to inform the plaintiff in the event of change of premise address: Regulation 3(2) of the Licensee Supply Regulations 1990.

[25] The defendant claimed that the premise is rented by Sem Ann which no longer operates and that the defendant was at the time of signing the letter of undertaking was representing Sem Ann. As to how the letter of undertaking arises, the letter of 1 April 2011 inviting for the discussion was issued to Ong by the plaintiff upon Ong's request to settle the matter (p. 90 of record of appeal). Based on the undisputed facts, the defendant came for the discussion with the plaintiff. The outcome of the discussion had been reduced into writing where an undertaking is agreed and drawn up for the defendant to pay the agreed payment. The fact remains that the undertaking was made between the defendant and the plaintiff and was signed by the defendant. There is nowhere in the letter of undertaking that the defendant was representing Ong or Sem Ann. There is no evidence that the defendant, during the discussion with the plaintiff, revealed that he was representing Ong or Sem Ann or the premise is occupied by Sem Ann.

[26] The letter of undertaking produced by the plaintiff can be found at pp. 74-76 of the record of appeal. An extraction of the letter of undertaking at pp. 74-75 of record of appeal is reproduced in parts, for ease of reference:

SURAT AKUJANJI

Kepada:

Tenaga Nasional Berhad
No. 129 Jalan Bangsar
P.O. Box 11003
50732 Kuala Lumpur

Saya/Kami, Ahmad bin Alias (No. Kad Pengenalan/No. Pendaftaran Syarikat: 741029-14-6221) yang beralamat di Lot 3242, Bt 15, Kg Paya Jaras Dalam 47000 Sungai Buloh sesunggunhnya bersetuju dan berakujanji dengan Tenaga Nasional Berhad seperti di bawah berikut:

1. Saya/Kami pengguna yang berdaftar di atas nama Ong Geok Khuan dan nombor akaun pengguna 00314433 bagi bekalan elektrik yang dibekalkan oleh TNB ke premis yang beralamat di Lot 1296, Jln Bkt Kemuning, Bt 7, Seksyen 32, 40460 S. Alam.

2. Saya/Kami bersetuju menyatakan bahawa telah terdapat tunggakan bil elektrik/tuntutan terkurang caj sebanyak RM102,471.25 yang 'masih belum dijelaskan sepenuhnya oleh pihak saya/kami.

3. Saya/Kami berakujanji bahawa akan menjelaskan tunggakan/tuntutan tersebut dengan 12 kali bayaran ansuran yang bermula pada bulan Mei 2011 sehingga April 2012 dengan jumlah ansuran sebanyak RM9,000 seperti yang telah dipersetujui di dalam Jadual Pembayaran seperti yang dilampirkan.

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4. Saya/Kami bersetuju untuk menjelaskan caj penalty lewat bayar satu peratus (1%) apabila bil elektrik tertunggak atau tuntutan terkurang caj masih belum dijelaskan pada tarikh yang telah ditetapkan.

5. Saya/Kami bersetuju bahawa TNB berhak memindahkan apa-apa amaun di atas yang masih tidak berbayar akibat kegagalan saya/kami
B mematuhi Jadual Pembayaran seperti yang telah ditetapkan ke dalam many-mana akuan yang didaftarkan di atas nama saya/Kami (sekiranya ada). (*)

...

8. Saya/Kami juga bersetuju akan menanggung apa-apa kerugian atau
C perbelanjaan termasuk kos dan yuran guaman dalam menguatkuasakan akujanji ini di Mahkamah.

9. Akujanji ini mengikat pewaris, wasi, pentadbir, pengganti hakmilik dan wakil-wakil yang dilantik oleh pihak kami.

AKUJANJI ini telah dilaksanakan pada tarikh 03/05 tahun 2011

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Ditandatangani oleh & bagi pihak Syarikat ...

Nama	Ahmad bin Alias
No. Telefon	012-4336959
No. Kad Pengenalan	741029-14-6221

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Disaksikan oleh	...
Nama	NOORMAH BT MAHMOOD
No. Kad Pengenalan	...

Ditandatangani oleh & bagi pihak TNB

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Nama	SHAKILA PARVEEN BT SHAIK ALLAUDEEN (No. Pekerja: 10027471)
Jawatan	Pengurus Perkhidmatan Pengguna & Pemasaran
...	
No. Pekerja	3/5/2011

G **[27]** Upon careful perusal of the letter of undertaking, at para. 1, it is mentioned the registered consumer in the name of Ong Geok Khuan. It is mentioned that the person giving undertaking is addressed as "Saya/Kami" which relates to a person, an individual and "Kami" which connotes a group of persons or for addressing a company which is recognised as a person in
H law. Based on s. 3 of the Interpretation Acts 1948 and 1967 (Act 388), a "person" is defined, "includes a body of persons, corporate or unincorporate". This court viewed that the person giving undertaking addressing itself as "Saya/Kami" is not inconsistent with the signing of that bears the wording "ditandatangani oleh & bagi pihak syarikat". The person giving undertaking is the same person as the one signed, that is the defendant,
I to undertake the payment with TNB. To simply put it, the letter of undertaking clearly proves to show that the defendant consented and undertakes to pay the plaintiff.

[28] This court holds the view that an undertaking is binding where it is expressly stated by consent between parties, whether the other is an individual or a company. Relying on the Federal Court case of *Mohamed Mustafa v. Kandasamy* [1979] 1 LNS 53; [1979] 2 MLJ 109, the intention of the parties is ascertained based on the substance of the agreement rather than looking at its form. The letter of undertaking is a standard letter of undertaking prepared by the plaintiff. The substance of the undertaking is the payment undertaking by the defendant to the plaintiff.

[29] Accordingly, where the evidence of the agreement following s. 91 and s. 92 of the Evidence Act 1950 had been reduced to writing, it cannot then be subjected to questioning so as to change the terms in the agreement. Based on the facts and evidence before this court, this court finds that the defendant is bound to make the payment following the undertaking. The defendant is estopped from leading evidence contradicting, varying, adding to or subtracting from the terms provided in the letter of undertaking.

[30] On the case relied on by the defendant, in *Ooi Poh Chin* (*supra*), the facts can be distinguished from the current case. The tenant who was not the registered consumer with Tenaga Nasional Berhad (TNB) had commenced an action for a declaration that the tampering was not done by the tenant and further filed an injunction to restrain TNB from disconnecting the electricity supply after TNB has issued a termination notice addressed to the registered consumer. The Alor Setar High Court decided that the tenant has no *locus standi* to file the action against TNB as the tenant was not the registered consumer and therefore TNB did not owe any contractual duty to the tenant to supply electricity. In this case, the defendant came for discussion instead of the registered consumer, to an undertaking to pay for the outstanding charges that had been agreed between the defendant and the plaintiff. It is the plaintiff's claim in the current appeal that a breach of undertaking had been committed by the defendant.

[31] This court finds that there is a breach of undertaking committed by the defendant and the proposed defence and the defendant's affidavit in support are mere denial of the defendant's undertaking that had been agreed between the defendant and the plaintiff. This court finds no defence of merits and is of the view that the Sessions Judge's decision was wrong in law which warrants for this court's intervention: *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1.

[32] In light of the above reasons, the appeal is allowed with costs and the Sessions Judge's decision is reversed.